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Wills and Decedents' Estates

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curity for the loan, and will not be compelled to transfer the property to the borrower until he repays the loan.¹

Constructive Trust

In July, 1947, plaintiff purchased real estate in Ohio, title to which he placed in defendant's name because she said to him "I'm your wife. You don't have anything in my name. I think you should put this in my name." Subsequently, plaintiff learned that at the time of his marriage to defendant she had a husband who was — and still is — living, and from whom she had not been divorced. Plaintiff thereupon brought suit in the court of common pleas, asking that a constructive trust be impressed upon the property for his benefit and that the property be transferred to him by a proper instrument of conveyance. From a judgment for the plaintiff, defendant appealed on questions of law and fact. In affirming the judgment, the court of appeals found that the plaintiff bought the property as an investment and placed the title in the defendant's name because of her misrepresentation as to her marital status and not as a gift to her, and not to place it beyond reach of his creditors.²

Insurance Trust

An agreement between a beneficiary under a life insurance policy and a second party where, "in consideration of said second party paying the premiums when due," the beneficiary "agrees that he will endorse and pay over unto the second party any proceeds or benefits that he may receive or have the right to receive under said policy," is valid; and a trust in favor of the second party will be imposed upon the proceeds of the policy when the insured dies.³

ROBERT C. BENSING

WILLS AND DECEDENTS' ESTATES

PROBATE

Proof of Will at Probate

The Ohio Revised Code¹ sets forth the following formality for the execution of wills in Ohio:

Except oral wills, every last will and testament shall be in writing . . . signed at the end by the party making it, . . . and be attested and subscribed

1. *Pietro v. Pietro*, 151 N.E.2d 916 (Ohio Ct. App. 1957).
2. *Malone v. White*, 153 N.E.2d 413 (Ohio Ct. App. 1957).
3. *Finney v. Hinkle*, 153 N.E.2d 699 (Ohio Ct. App. 1958).

in the presence of such party, by two or more competent witnesses, who saw the testator subscribe, or heard him acknowledge his signature.

In *Blankner v. Lathrop*,² the executor was one of the two necessary subscribing witnesses. In *Fazekus v. Gobozy*,³ a person who was the executor and also a trustee under the will was an essential subscribing witness. In each of the cases the courts upheld the validity of the wills.

In neither of the foregoing cases was any witness to the respective wills a devisee or legatee. Both were executors and one was also a testamentary trustee who received fixed fees for services rendered.⁴ Consequently the section of the Ohio Revised Code⁵ which makes devisees and legatees competent witnesses by voiding the testamentary gift had no application.

An undesirable aspect of statutory technical requirements to the execution of documents is clearly evident in the case of *In re La Mar's Will*.⁶ In this case the probate court refused to probate a will because, according to the oral testimony of the two subscribing witnesses, they did not see testatrix sign the will, testatrix did not acknowledge her signature to them, and the will was so folded that they could not see testatrix' signature at the time they subscribed.

The Ohio Revised Code⁷ as set forth above, as to wills executed in Ohio, specifically requires the testator to sign in the presence of the subscribing witnesses or to acknowledge his signature to them. Consequently, by applying the specific language of the statute to the facts as related and in construing this language in light of the decisions of other states, the probate court's determination was proper.⁸

It is significant that in the *LaMar* case the subscribing witnesses unhesitatingly and unequivocally testified at the hearing to probate the will that testatrix' signature at the end of her will was genuine. In Pennsylvania which simply requires that a will be proved by two competent witnesses who do not have to be subscribing witnesses, there would have been no problem in probating this will.⁹

1. OHIO REV. CODE § 2107.03.

2. 154 N.E.2d 95 (Ohio Ct. App. 1958).

3. 78 Ohio L. Abs. 258, 150 N.E.2d 319 (Ct. App. 1958).

4. 1 PAGE, WILLS §§ 325, 327 (3d ed. 1941).

5. § 2107.15.

6. 146 N.E.2d 472 (Ohio P. Ct. 1957).

7. § 2107.03.

8. Note, 4 WEST. RES. L. REV. 158 (1953); 1 PAGE, WILLS § 349 (3d ed. 1941)

9. PA. STAT. ANN. tit. 20, §§ 180.2, 180.4 (1950).

If both subscribing witnesses to the *LaMar* will had predeceased the testatrix, their signatures would have been proved by witnesses who were familiar with their signatures and the testatrix' will would have been probated.

In Ohio, a will is entitled to probate upon the making of a *prima facie* case.¹⁰ The *LaMar* will contained the usual attestation clause which either stated that testatrix signed in the presence of the subscribing witnesses or that testatrix acknowledged her signature in the presence of these witnesses. Many courts hold that a recital of due execution creates a presumption that the facts were as recited. Thus there is in the *LaMar* case a conflict between the attestation clause and the later oral testimony of the subscribing witnesses. The probate court was certainly not required to ignore this conflict. There is some danger in giving too much weight to oral testimony of a subscribing witness at probate when his testimony is inconsistent with the formal attestation clause. Memory is not infallible and is certainly not necessarily reliable because of its apparent clarity.¹¹

For the foregoing reasons, the writer restates his position that the Pennsylvania statute is an improvement over statutes similar to Ohio's.¹²

Will Contest¹³

In *Greer v. Stiver*,¹⁴ an action to contest the will was filed one day prior to the expiration of the statutory six-month period for contest. Summons were issued the same day against all necessary parties except one heir. This heir was named as a defendant and was united in interest with all the other co-defendants. Therefore, the court, following the earlier case of *Draher v. Walters*,¹⁵ overruled defendant's motion to dismiss for want of jurisdiction.

10. *In re Estate of Lyons*, 166 Ohio St. 207, 141 N.E.2d 151 (1957).

11. "... even where a subscribing witness denies the existence of certain facts necessary for the legal execution of the will, the presumption of regularity may prevail over such direct evidence. The subscribing witness by acting as such, in effect formally declares that all the facts necessary to the legal execution of the will exist, and in advance, by acting as a subscribing witness, he has seriously discredited his subsequent denial of these facts under oath." 2 PAGE, WILLS § 758 (3d ed. 1941).

12. 8 WEST. RES. L. REV. 383, 384 (1957).

13. Two 1958 cases, *Fletcher v. First National Bank*, 167 Ohio St. 211, 147 N.E.2d 621 (1958) and *Abbott v. Dawson* 167 Ohio St. 238, 147 N.E.2d 609 (1958), are considered in the 1957 Survey of Ohio Law.

14. 149 N.E.2d 56 (Ohio C.P. 1958).

15. 130 Ohio St. 92, 196 N.E. 884 (1935).

Rights of Surviving Spouse — Purchase of Mansion House

The Ohio Revised Code¹⁶ clearly defines mansion house as "including the parcel of land on which such house is situated and lots or farm land adjacent thereto and used in conjunction therewith as the home of the decedent." Therefore, in *Young v. Young*,¹⁷ the court of appeals properly reversed the probate court for refusing to allow a widow to buy her deceased husband's undivided half interest in a small tract (36.87 acres) of farmland upon which their home was located.

Administration — Presentation of Claims and Revival

The Revised Code¹⁸ provides that when an action is brought against a defendant who thereafter dies before the Plaintiff's claim has been heard, written notice of application to revive the action against the deceased's personal representative must be given to the personal representative within the statutory time for presentation of claims of creditors. The Ohio Supreme Court properly reversed the common pleas court and the court of appeals in *Miller v. Andre*¹⁹ because the action was revived against defendant's personal representative within the statutory period.

The *Miller* case arose from a motor vehicle accident. The defendant died March 2, 1954 and his widow was appointed executrix on May 14, 1954. However, plaintiff did not learn of defendant's death until November 29, 1954 at a pre-trial hearing. On December 2, 1954 plaintiff moved to substitute defendant's executrix as defendant and the court granted the motion.

Since the motion for substitution was made more than four months after the appointment of defendant's executrix, plaintiff, on January 13, 1955, petitioned the probate court for authority to present her claim after the four months limitation and within the nine months limitation. In the meantime on January 21, 1955 defendant's executrix died and an administrator d.b.n., c.t.a. of defendant's estate was appointed. Consequently on March 4, 1955, the probate court authorized presentment of plaintiff's claim to this administrator. Plaintiff claimed that the administrator was served with an affidavit of claim March 7, 1955, but the administrator denied any service or presentment of a claim to him. On March 7, 1955, plaintiff petitioned the common pleas court to substitute the administrator d.b.n., c.t.a. as defendant and service was had on the

16. § 2113.38 (A).

17. 106 Ohio App. 206, 154 N.E.2d 19 (1958).

18. § 2311.31.

19. 167 Ohio St. 83, 146 N.E.2d 598 (1957).

administrator March 11, 1955. After a hearing September 30, 1955 on plaintiff's motion for an order of revivor, the motion was overruled and the case dismissed because plaintiff had failed to present her claim to the administrator d.b.n., c.t.a. and to have it rejected before moving to revive the action.

The Ohio Supreme Court overruled the common pleas court and the court of appeals because the probate court granted plaintiff's petition for an extension of time and plaintiff had complied with the Ohio Revised Code.²⁰ Plaintiff complied with the Code by serving upon defendant's executrix within nine months of her appointment a copy of the petition to revive the action against the executrix. It was therefore unnecessary to present any claim after the death of the executrix to the administrator d.b.n., c.t.a.

As a general rule statutes of limitation do not run against the state unless they specifically so provide. For this reason the court of appeals in *Division of Aid for Aged v. Mull*²¹ held that the state's claim against the estate of a person who received public aid was not barred by its failure to sue within two months after receipt of notice of the rejection of its claim.

In the case of *In re Estate of Sowards*,²² the court of appeals also protected the claim of the state for the care of a mentally incompetent person who died in a state institution against the contention that it was barred by the Ohio nonclaim statute.²³ In the *Sowards* case the court construed the Ohio Revised Code²⁴ as placing the burden upon the personal representative of a person who dies while an "inmate of any benevolent institution under the jurisdiction of the department of mental hygiene . . . and who is possessed of property," to ascertain from the department whether the decedent was supported while an inmate. Accordingly there was no duty on the state to file its claim.

This writer believes that the Ohio non-claim statute should be amended to specifically include claims by the state against the estate of a decedent. Such an amendment would facilitate the orderly and prompt administration of estates.²⁵

The last of the cases involving the non-claim statute is *In re Estate of Wyckoff*.²⁶ In the *Wyckoff* case claimant's administrator was his father

20. §§ 2311.31, 2117.07.

21. 105 Ohio App. 305, 152 N.E.2d 295 (1957).

22. 105 Ohio App. 239, 152 N.E.2d 146 (1957).

23. § 2117.06.

24. § 5121.07.

25. SIMES, MODEL PROBATE CODE § 135 (1946).

26. 105 Ohio App. 212, 152 N.E.2d 141 (1958).

who was judicially incompetent for 40 days of the four-month period during which the claim for wrongful death should have been submitted. For this reason, under the exception to the non-claim statute where a claimant was subject "to any legal disability during such period or any part thereof," the probate court, within its discretion, properly allowed the filing of the claim after the expiration of the four-month period.

Priority

A more difficult case involving the Division of Aid for the Aged is *Fultz v. Singer*.²⁷ In the *Singer* case the Division contended that its lien for \$7,507 under the Ohio Revised Code²⁸ was prior to the widow's exemption of \$540 and her allowance of \$1800 for a year's support. The probate court was unable to accept this construction. It construed various sections of the Revised Code²⁹ together and ordered distribution of the proceeds from the sale of decedent's realty, in the following order: costs and expense of sale of realty including administrator's fee and attorney's fee;³⁰ taxes, penalties and interest against realty;³¹ other costs of administration, including attorney's fee;³² funeral expenses not in excess of \$300;³³ widow's exemption;³⁴ widow's support allowance;³⁵ reimbursement of Division of Aid for Aged upon its lien and preferred claims.³⁶

Private Sale of Securities With Court Approval

The case of *Dombey v. Rindfoos*³⁷ involves an attempt by the executors, pursuant to their powers in the will and with the approval of the probate court to sell at private sale the testator's bank stock and testator's savings and loan company stock, both of which had a substantial but no established market value. Testator's will conferred upon his executors the same powers of sale as it granted to the testamentary trustees. In addition to a provision that the stock should not be sold for less than its book value it read in part as follows:

27. 78 Ohio L. Abs. 177, 149 N.E.2d 270 (Ohio P. Ct. 1958).

28. § 5105.24.

29. §§ 2117.25, 2117.38, 5105.13, 5105.24.

30. § 2127.38.

31. § 2127.38.

32. § 2117.25.

33. § 5105.13.

34. §§ 2115.13, 2117.25, 5105.13.

35. §§ 2117.20, 2117.25, 5105.13.

36. § 5105.13.

37. 105 Ohio App. 335, 151 N.E.2d 563 (1958).

(h) Subject only to the restrictions mentioned in this Item V . . . any said Trustees shall have and exercise all of the powers, privileges and discretions which I might have and exercise if present and acting personally in the premises.

Other paragraphs of the will stated that in the sale of securities after purchase or in participating in mergers, the trustees or executors should, in their discretion, use their best judgment for the trust.

Under these provisions of testator's will, the executors asked the probate court to approve a sale of both blocks of stock to William C. Cook and Associates for \$988,731, although they had received from Alex S. Dombey, who was acting as agent for named principals, an offer of \$1,250,500 *in cash*. The executors elected not to sell to Dombey because testator prior to his death "frequently indicated that he did not wish such stock to come into the possession of Alex S. Dombey or anyone connected or associated with him." The probate court not only admitted this testimony but apparently relied upon it in approving the proposed sale by the executors to William C. Cook and Associates at a substantially lower price than the highest offer. Incidentally, when the probate court approved the sale to William C. Cook, he was still attempting to obtain the purchase money through loans and through the sale of stock.

The court of appeals properly reversed the probate court because the extrinsic evidence as to testator's wishes should never have been admitted to add to the clear terms of the will. Furthermore, the executors' primary duty was to the trust. Consequently, they were bound to sell the stock at the highest price obtainable. In the words of the court of appeals, "the language authorizing the trustees to act as if they were the 'absolute owners of the Trust Estate' and to exercise privileges and discretions which the testator would exercise if present, cannot mean more than that the decedent intended that the fiduciaries would act reasonably, as required by law, and for the best interest of the trust estate."

Death of Beneficiary Within 30 Days of Testator's Death

The Ohio Revised Code³⁸ provides:

When the surviving spouse or other heir at law, legatee or devisee dies within thirty days after the death of the decedent, the estate of such first decedent shall pass and descend as though he had survived such surviving spouse, or other heir at law, legatee or devisee. . . . This section shall not apply in the case of wills wherein provision has been made for distribution of property different from the provisions of this section.

In *Barrick v. Fligle*,³⁹ the first of two cases involving this statute,

38. § 2105.21.

39. 103 Ohio App. 507, 146 N.E.2d 330 (1957).

the testatrix died two days before her second husband to whom she left certain property. There was no reference in the will to the Revised Code as quoted above. The heirs of the husband contended that the section does not apply when the person who dies first dies testate. The court of appeals properly rejected this contention because the statute specifically refers to "legatee or devisee" and affirmed distribution to the wife's heirs of the property willed to her husband. The second paragraph of section 2105.21 above had no application because testatrix' will contained no language to indicate that it should not be applicable.

In the second case, *Allen v. Barnecut*,⁴⁰ the testator, after a few small bequests, willed all his property to his widow. Twelve days after the testator's death his widow executed her will. She died 20 days after testator's death. It was contended by the legatees and devisees under the widow's will that since her will was executed after the death of testator the second paragraph of section 2105.21 applied. They particularly emphasized that this paragraph refers to "wills." The common pleas court properly construed this second paragraph as referring to "wills" executed by the person who dies first and ordered distribution of testator's property among his heirs as intestate property.

Construction of Wills⁴¹

In *Poe v. Sheehan*⁴² the testator provided in his will "that within one month after the inventory has been approved and the appraisement of the real estate has become conclusive . . . my beloved wife . . . shall select from my . . . estate . . . to the appraisal value of one-half my net estate, those items which . . . I give to her. . . ." The court of appeals construed the word "shall" as directory only and therefore the wife did not have to make the selection within the stated period.

Descent and Distribution

In a somewhat unusual case, the probate court in *Kest v. State*⁴³ held that the illegitimate child of intestate's wife inherited intestate's property when there were no surviving heirs other than this "stepchild." The Ohio statute of descent and distribution lists "stepchildren" as the last heirs before title escheats to the state. Although the intestate was not the father of the child, nevertheless, the child was the natural child of intestate's wife and therefore his stepchild.

40. 153 N.E.2d 792 (Ohio C.P. 1958).

41. For cases on the construction of wills and trusts involving future interests, see FUTURE INTERESTS, *supra*, in this survey.

42. 106 O. App. 413, 151 N.E.2d 660 (1958).

43. 77 Ohio L. Abs. 193, 146 N.E.2d 755 (P. Ct. 1957).

In *In re Estate of Sherick*,⁴⁴ a husband who had two sons by a prior marriage died testate leaving certain property to his second wife who survived him. The second wife died intestate possessed of the identical property which she received from her deceased husband and survived by no lineal descendants. One of the husband's sons predeceased his stepmother leaving his brother as his sole heir. Consequently on the death of the wife the sole surviving son of her husband (her stepson) took under the half and half statute.⁴⁵

The probate court and the court of appeals held that under the Ohio inheritance tax the son who inherited property under the half and half statute took from his father and not from his stepmother. The Supreme Court properly reversed these decisions because the stepchild obviously took as heir of his stepmother.

A basic and general test of a statute of descent and distribution is whether it provides for the distribution of an intestate's property among the natural objects of his bounty.⁴⁶ Under this test the Ohio statute is out of date because it provides for distribution among distant relatives, who have been called "laughing heirs" by some writers,⁴⁷ as well as to stepchildren in the absence of any relatives.⁴⁸ The modern statutes of descent and distribution normally provide for no distribution to relatives more remote than the issue of intestate's grandparents.⁴⁹

ROBERT N. COOK

44. 167 Ohio St. 151, 146 N.E.2d 727 (1957).

45. OHIO REV. CODE § 2105.06.

46. "If, by any accident a man should die without making his will, it would seem to be the province of an equitable legislature to make such disposition of his property as would, in ordinary circumstances most nearly correspond with his intention." WILLIAMS, PRINCIPLES OF THE LAW OF PERSONAL PROPERTY 601 (18th ed. 1926); see also, Morison, *Administration of Estates Act*, 1954, 2 SYDNEY L. REV. 129 (1956).

47. "As the German's pungent phrase 'der lachende Erbe' (the laughing heir), so aptly indicates succession by one who is so loosely linked to his ancestor as to suffer no sense of bereavement at his loss arouses a certain resentment in society." Cavers, *Change in the American Family and the "Laughing Heir,"* 20 IOWA L. REV. 203 (1935).

48. OHIO REV. CODE § 2105.06.

49. SIMES, MODEL PROBATE CODE § 22 (1946). Compare, KAN. GEN. STAT. § 59-509 (1949) (no inheritance beyond sixth degree); PA. STAT. ANN. tit. 20, § 1.3 (1950) (no inheritance beyond first cousins); Administration of Estates Act, 1925, 15 & 16 Geo. 5 c. 23, as amended, Intestates Estates Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 64 (no inheritance beyond first cousins).